IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JULY 12, 2006 Session

JEREMY FLAX, ET AL. v. DAIMLERCHRYSLER CORPORATION, ET AL.

Direct Appeal from the Circuit Court for Davidson County
No. 02C-1288 Hamilton V. Gayden, Jr., Judge

No. M2005-01768-COA-R3-CV - Filed on December 27, 2006

This appeal comes from a wrongful death action brought by the parents of an infant child who died from injuries suffered in an automobile accident. In 2001, the mother was one of several passengers involved in a collision in which a man, driving his pickup truck and speeding, rear-ended the minivan occupied by mother and her infant son. The plaintiff parents' infant son suffered a fatal injury when his head collided with the head of another occupant of the vehicle, who was seated in the passenger seat directly in front of the child and whose seat fell backwards during the accident. The mother and father of the deceased child brought suit against the manufacturer of the minivan and the man who drove the truck that struck the minivan. The parents' claims against the manufacturer were for wrongful death of their son as a result of the manufacturer's defective design of the front seat backs in the minivan and failure to warn of the defect, and the mother also brought a claim against the manufacturer for negligent infliction of emotional distress as a result of witnessing her son's injury. The jury found for the parents and awarded them $5 million in compensatory damages for the wrongful death claim, and awarded the mother $2.5 million for her negligent infliction of emotional distress claim. The jury also found that the manufacturer had acted recklessly and was liable for punitive damages. The trial court bifurcated the trial, and the jury returned a $98 million punitive damages verdict against the manufacturer. The trial court remitted the punitive damage award to $20 million. The manufacturer filed a timely notice of appeal to this Court alleging several errors at trial: that the parents' complaint contained an invalid *ad damnum* clause; that the plaintiff mother had not satisfied the proof requirements for a negligent infliction of emotional distress claim; that there was insufficient evidence of recklessness to support an award of punitive damages; that the trial court improperly recognized a post-sale duty to warn in Tennessee; numerous evidentiary errors and alleged discovery abuse warranting a mistrial; and excessive damage awards. We affirm in part and reverse in part.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Theodore J. Boutrous, Jr., of Los Angeles, CA, Thomas H. Dupree, Jr., of Washington, D.C., Lawrence A. Sutter, of Franklin, TN, and Joy Day, of Franklin, TN, for the Appellants.

Gail Vaughn Ashworth, of Nashville, TN, James E. Butler, Jr., of Atlanta, GA, George W. Fryhofer III, of Atlanta, GA, and Leigh Martin May, of Atlanta, GA, for the Appellees.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts concerning the automobile accident central to this litigation are not in dispute. On June 30, 2001, Defendant Louis Stockell, Jr. ("Stockell") was driving his pickup truck on Old Charlotte Pike in Davidson County, Tennessee. Plaintiff Rachel Sparkman ("Ms. Sparkman") and her infant son, Joshua Flax ("Joshua") were occupants of a 1998 Dodge Caravan ("the Caravan") minivan which was pulling out of a residential driveway onto Old Charlotte Pike. Ms. Sparkman's parents owned the minivan, and her father, Jim Sparkman ("Grandfather Sparkman") was driving the vehicle. Joe McNeill ("McNeill"), a friend of the family, sat in the passenger seat, and Joshua was sat in a child-safety seat directly behind McNeill. Ms. Sparkman sat in the seat next to Joshua and directly behind the driver's seat. Sitting in the back row of seats were Ms. Sparkman's mother and McNeill's wife.

As Grandfather Sparkman drove the Caravan onto Old Charlotte Pike from the driveway, he noticed Stockell speeding toward the vehicle and drove into the oncoming lane of traffic to avoid a collision. As he did so, Stockell also moved into the oncoming lane of traffic and collided with the rear of the Caravan. At the time of impact, McNeill's seat fell backward and McNeill's head collided with Joshua's. This collision resulted in skull and brain injuries to Joshua from which the child died the next day. None of the other occupants of the minivan were seriously injured.

On May 7, 2002, Ms. Sparkman and Joshua's father, Jeremy Flax ("Flax," collectively, "Plaintiffs" or "Appellees"), filed a complaint against both DaimlerChrysler Corporation ("DCC," "Chrysler," or "Appellant"), as manufacturer of the vehicle, and Stockell. Plaintiffs alleged wrongful death under four theories: negligence of DCC, strict liability in tort of DCC, fraudulent concealment of defect and misrepresentation by DCC,[1] and negligence of Stockell.

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[1] Initially, Ms. Sparkman's parents, as owners of the minivan, had been included as plaintiffs in the lawsuit. Their claim of fraudulent concealment and misrepresentation was allegedly based upon their buying the Caravan in reliance upon DCC's advertisements that stressed the safety features of the minivan. However, Joshua's grandparents eventually dropped their claim, and they were dismissed voluntarily as parties by court order on October 29, 2004, (continued...)

Plaintiffs' claim of negligence against DCC alleged that it had breached its duty "to exercise reasonable care to design, test, manufacture, inspect, market, distribute, and sell the Caravan free of the unreasonable risk of physical harm to prospective owners, users, and occupants, including plaintiffs." Plaintiffs' claim under strict liability alleged that the design of the front seat backs in the Caravan made the seats defective and unreasonably dangerous. Plaintiffs asserted that "[t]he front seats and seat backs in the 1998 Dodge Caravan lacked the strength and structural integrity to hold . . . [Grandfather Sparkman and McNeill] in an upright and stable position during a rear-end collision in a foreseeable impact." Plaintiffs further alleged that DCC knew that the design of the front seats rendered them defective or unreasonably dangerous, and that DCC should be held liable for "advertising and marketing the 1998 Dodge Caravan in an attempt to induce families with children to purchase the 1998 Dodge Caravan and to place their children behind seats which are designed to collapse in rear end collisions." Ms. Sparkman claimed to have relied upon DCC's representations as to the safety of placing children behind these seats when she placed Joshua in his car seat behind the front passenger seat. Plaintiffs claimed that DCC knew, or should have known, from its own testing and from other incidents of injuries to minivan occupants, "that the front passenger seat and seat back would fail, collapse, give way, or bend backwards in foreseeable rear-end collisions and that serious injury to the vehicle occupants could result." Plaintiffs' claim against Stockell asserted that he had been negligent in speeding, failing to maintain his vehicle, failing to keep a proper lookout, and failing to maintain a safe and reasonable distance behind the Caravan, and that his negligence together with the negligence and design defects of DCC caused Plaintiffs' injuries.[2]

Plaintiffs sought compensatory damages for the wrongful death of their son, including damages for Joshua's mental and physical suffering, general damages for the full life of Joshua, and damages for loss of filial consortium, as well as punitive damages. Ms. Sparkman individually sought damages for negligent infliction of emotional distress ("NIED"). Plaintiffs did not set forth a specific dollar amount sought in compensatory damages, but instead used the language "in an amount to be determined by the enlightened conscience of the jury and as demonstrated by the evidence . . . ." Similarly, Plaintiffs designated the amount sought in punitive damages against DCC to be "an amount to be determined by the enlightened conscience of the jury to be sufficient to punish [it] and deter it from similar future conduct."

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[1](...continued)
pursuant to Tennessee Rule of Civil Procedure 41.01. Plaintiffs Rachel Sparkman and Jeremy Flax filed a recast complaint on October 25, 2004.

[2] On October 29, 2003, DCC filed a motion for sanctions against defendant Stockell for his failure to appear at depositions and for his failure to respond to interrogatories. DCC requested sanctions in the form of denying Stockell the opportunity to raise any defenses at trial and testify to any matters in the lawsuit. The trial court entered an order granting DCC's motion for sanctions against Stockell, which Plaintiffs did not oppose, on July 15, 2004. This order excluded Stockell from testifying at trial or otherwise presenting defenses to Plaintiffs' claims against him. The fault of Stockell was therefore pre-determined by the trial court, and the jury was instructed that "[t]he Court finds Louis Stockell was at fault." The verdict form presented to the jury for its Phase One deliberation was already marked "Yes" to the question, "Do you find the defendant Louis A. Stockell, Jr., to be at fault?". The allocation of fault, however, was left for determination by the jury, which found DCC and Stockell to each be 50% at fault.

On August 6, 2002, in light of discovery requests to DCC from Plaintiffs, the trial court entered a sharing protective order, which applied to those documents that DCC considered "proprietary and competitively sensitive, and that it wishe[d] to protect from dissemination." The nature of these documents varied greatly and included depositions of customers involved in other litigation against the company, DCC testing data related to the specific seat in question (which Chrysler referred to as the "NS" model), DCC records detailing specific complaints from customers about the seat's performance in accidents, DCC's own accident investigation reports in response to these complaints, and police reports and photographs from accidents involving automobiles equipped with the seat. The evidence relating to injuries from occasions of NS seat "collapse," or "yield," alleged by other customers was referred to by the parties and the trial court as "other similar incident," or "OSI," evidence. DCC filed a motion in limine regarding the OSI evidence, seeking to exclude the exhibits as irrelevant. The trial court conducted extensive pre-trial hearings dealing with the admissibility of this evidence. Of the several hundred incidents related to NS seat failure, and based upon Plaintiffs' offers of proof through collaborative research by their expert witness Kenneth Saczalski, the trial court ultimately determined that only 37 of these OSI's were substantially similar enough to the Flax accident to be relevant on the issues of dangerousness or defect, or notice to DCC.

On October 4, 2004, DCC argued its motion for summary judgment on the issue of punitive damages, which the court denied. On October 28, 2004, in response to the trial court's allowing Plaintiffs' post-sale duty to warn claim to proceed, DCC filed a motion and accompanying memorandum with this Court for an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, seeking a continuance of the November 1, 2004, trial date. This Court denied the motion in a mandate issued on December 7, 2004.

Trial began in circuit court in Davidson County on November 3, 2004, before the Honorable Hamilton V. Gayden, Jr. and a jury. Recurring issues at trial involved the tendency of the NS seats to "yield" or "collapse" in rear-end accidents. Plaintiffs alleged that this design in fact increased the risk of injury to passengers who sat in the second row of seats behind the NS seats, and that stiffer, more rigid seats, such as the ones found in the 1996 Sebring, should have been utilized in the minivan that would be resistant to "collapse" in rear-end accidents. Plaintiffs claimed that DCC's own testing of its minivan seats made it aware of the danger to passengers located behind the NS seats in rear-end collisions, as did many complaints from consumers who had experienced similar problems with the seats.

Another important aspect of Plaintiffs' case was the alleged inadequacy of Federal Motor Vehicle Safety Standard 207 ("FMVSS 207"), which is the government standard for seat back strength that was established by the National Highway Traffic Safety Administration ("NHTSA"). Plaintiffs argued that DCC's undisputed compliance with FMVSS 207 did not shield it from liability for negligence or strict liability, because FMVSS was a static test, and accidents were often dynamic events, meaning that both vehicles are moving. Plaintiffs argued that FMVSS 207 was "meaningless and tells us nothing about what happens in car wrecks." They argued that DCC's own engineers were aware of the deficiency of this standard, and further, that DCC designed seats that were

significantly stronger than the NS seats in the 1996 Sebring and 1998 Ram pickup truck, but that DCC chose not to implement stronger seats into minivans until the 2001 "RS" seat.

DCC claimed that the NS was purposefully designed this way to prevent seat occupants from absorbing energy from a collision, and instead allowing the seat itself to absorb this energy by "yielding," which would minimize the risks of injury to the seat occupant. DCC maintained that its "yielding" design was preferable to a stiffer, more rigid design, because the latter would create a higher risk of head and neck injuries to a seat occupant in accidents, and especially when the occupant was "out of position." DCC claimed to have based its design decision on the relative statistical infrequency of rear-end accident fatalities. DCC argued that its yielding design was not unusual within the industry because a yielding seat design was present in most vehicles.

Plaintiffs began their case by showing the jury the videotaped deposition of Neville D'Souza, a DaimlerChrysler seat engineer who had designed the model seats for the original 1984 Chrysler minivans and who had certain expertise with later models of Chrysler minivan seats, including the NS seats at issue. Other videotaped testimony showed by Plaintiffs included depositions of other DCC employees from both the present case and from other cases in which DCC had been involved.[3] Plaintiffs' first live witnesses included the Caravan passengers involved in the Flax accident and eyewitnesses to the accident. Plaintiffs called two expert witnesses, Ronald Kirk, a consulting engineer whose primary focus was investigation, analysis, and reconstruction of motor vehicle collisions, and Kenneth Saczalski, a consulting biomechanical engineer who had, since the 1980's, conducted crash tests concerning seat back strength in automobiles. Plaintiffs also called: Colleen Buss, a woman whose child had suffered a skull fracture in an accident involving her 1997 Dodge Caravan; Dr. Joseph Burton, who testified about the injuries that killed Joshua and the possibility that the child had experienced conscious pain and suffering; Paul Sheridan, a Chrysler employee who had been a member of the "NS Body Minivan Complexity Team" in the 1990's; and Vanderbilt University professor William Damon, who was hired by Plaintiffs as an expert in finance and economics to ascertain the present value of lost income suffered by Joshua. Plaintiffs called individually father Jeremy Flax and mother Rachel Sparkman, who testified regarding his and her relationship with Joshua.

DCC's defense began with the testimony of Gregory Stephens, an engineer specializing in collision research and analysis. DCC next called Gary Moore, a Nashville firefighter and EMT who responded to the Flax minivan accident. DCC concluded their case with the expert testimony of Michael James, a mechanical engineer and accident investigator, who provided testimony regarding seat back design and strength, and David Blaisdell, a research engineer who also analyzed automobile accidents. Both experts testified about beneficial aspects of the NS seat design to

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[3] These witnesses were Andrew Foster, a Chrysler employee whose deposition testimony from the case of *Butler v. DaimlerChrysler* was shown, and Mitchel Porterfield, a Chrysler call center employee who was deposed for the Flax case. Porterfield's testimony indicated that Chrysler had received customer complaints about minivan seat backs as far back as the 1980's.

occupants, as well as certain injury risks to passengers that might increase from incorporating a stiffer design.

On November 15, 2004, DCC argued its motions for directed verdict as to the NIED claim, asserting that Sparkman had failed to satisfy her prima facie case by not presenting expert testimony, and on the issue of punitive damages, asserting that no reasonable juror could find by clear and convincing evidence that its conduct was reckless, and that it was improper for the court to impose a punitive award against them under a theory of post-sale duty to warn. The trial court denied these motions. On November 16, NHTSA issued a ruling in which it announced its decision to terminate rulemaking procedures for amending FMVSS 207 (regarding seat back strength) pending further study, and the trial court allowed the document into evidence. Trial concluded on November 22, 2004, and the jury returned a verdict for Phase I of the trial finding DCC and Stockell each 50% liable for compensatory damages and awarding Plaintiffs a total of $7.5 million in compensatory damages: $5 million to Plaintiffs for the wrongful death claim and $2.5 million to Ms. Sparkman individually on her NIED claim, and finding that punitive damages would be awarded based upon a finding of recklessness by DCC. After the verdict, DCC argued its motion to set aside the part of the judgment awarding punitive damages, which the trial court overruled. On November 23, 2004, the jury returned a verdict for Phase II of the trial, awarding $65.5 million and $32.5 million, for the wrongful death and NIED claims respectively, against DCC in punitive damages.

On January 20, 2005, DCC filed a motion notwithstanding the verdict on punitive damages and negligent infliction of emotional distress, "and for a new trial on all other issues." DCC argued these motions before the trial court on March 18, 2005. On April 28, 2005, some four months after the trial was over, DCC filed a supplemental motion seeking to have the judgments vacated for Plaintiffs' alleged failure to include a valid *ad damnum* clause in their complaint. DCC also filed a motion for a new trial based upon Plaintiffs' alleged failure to produce discovery materials related to tests performed in previous litigation by their expert, Saczalski, on the RS dual recliner seat – materials which showed the tendency of these seats to yield in a manner similar to the NS seat. The trial court denied these motions and remitted the punitive award to $20 million in its July 11, 2005 final order and judgment, but it denied Plaintiffs any discretionary costs as a sanction for failure to discover the Sebring tests. Plaintiffs accepted the remitted punitive award under protest. Appellant filed a timely notice of appeal to this Court on July 22, 2005.

II. ISSUES PRESENTED

On appeal, the issues raised for consideration by this Court, as we perceive them, are as follows:

1. Whether Plaintiffs' complaint adhered to the *ad damnum* clause, or statement of damages, requirement per T.C.A. § 29-28-107 for a products liability action brought in Tennessee;
2. Whether the evidence put forth by Ms. Sparkman for her NIED claim could support an award based upon this theory;
3. Whether the trial court improperly recognized a post-sale duty to warn in Tennessee;

4. Whether there was sufficient proof to support a jury finding of recklessness by DCC that warranted the imposition of punitive damages;
5. Whether evidentiary errors of the trial court or discovery misconduct by Plaintiffs require this Court to order a new trial; and
6. Whether the damage awards in this case were excessive or unconstitutional.
For the following reasons, we affirm in part and reverse in part.

III. DISCUSSION

A. Ad Damnum Clause

Appellant first alleges that it was error for the trial court to enter judgment for Plaintiffs when Plaintiffs' complaint did not contain a valid *ad damnum* clause stating the amount of damages sought. DCC claims that because Plaintiffs' complaint prayed for damages "in an amount to be determined by the enlightened conscience of the jury," rather than a specific dollar amount, that the trial court was "powerless" to enter judgment on their claim. DCC alleges that the language used by Plaintiffs in their complaint falls short of the requirements of T.C.A. § 29-28-107 for a statement of damages in a products liability action, and that it was error for the trial court to find the clause legally sufficient.

Appellees contend that their complaint met the requirements of T.C.A. § 29-28-107, because they stated "an amount" of damages sought. Plaintiffs argue that DCC's contention that this statute "requires a plaintiff to request a specific dollar sum" is neither supported by the wording of the statute or Tennessee common law. Plaintiffs accuse DCC of placing undue reliance on Tennessee cases that express the rule that "where a plaintiff requests a specific dollar sum in its complaint, the plaintiff cannot recover a judgment in excess of that specific sum." Appellees argue that these cases are immaterial because Appellees did not receive a verdict that *exceeded* the amount sought in the complaint, but rather a verdict in the exact amount of damages sought in the complaint. Appellees finally propose that even if DCC's argument is correct, that it is deemed to have waived the issue by not raising it in its answer, via pretrial motion, or at trial, but for the first time "five months after the trial and verdict."

"Under Tennessee law, a trial court may not enter a judgment in excess of the amount sought in the plaintiff's complaint." ***McCracken v. City of Millington***, No. 02 A01-9707-CV-00165, 1999 Tenn. App. LEXIS 185, at *26 (Tenn. Ct. App. March 17, 1999) (citing ***Gaylor v. Miller***, 166 Tenn. 45, 50, 59 S.W.2d 502, 504 (1933)). Rule 12.08 of the Tennessee Rules of Civil Procedure states: "A party waives all defenses and objections which the party does not present either by motion as hereinabove provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto . . . ." TENN. R. CIV. P. 12.08 (2006).

In 1978, the General Assembly enacted the "Tennessee Products Liability Act," which is codified at T.C.A. §§ 29-28-101-108. ***First Nat'l Bank of Louisville v. Brooks Farms***, 821 S.W.2d 925 (Tenn. 1991). T.C.A. § 29-28-107 (2006) provides special pleading requirements for actions

brought under the Act, and states: "Any complaint filed in a products liability action shall state an amount of such suit sought to be recovered from any defendant." The Act contains a section defining its key terms, and the term "product liability action" is defined to include:

> all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. "Product liability action" includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever[.]

T.C.A. § 29-29-102(6) (2006). An action for wrongful death has been held to fall within the scope of this definition. *See, e.g.*, ***Milligan v. American Hoist and Derrick Co.***, 622 F. Supp. 56, 58 (W.D. Tenn. 1985).

It is clear that T.C.A. § 29-28-107 controls the pleading of damages in this case. As Plaintiffs alleged a defective or unreasonably dangerous seat back design and warning, they were required to state an amount of damages sought. Neither Plaintiffs nor Defendants, however, have cited to any cases in this jurisdiction that have addressed whether the requirements under this section mandate the pleading of a *specific* dollar amount in a products liability action brought in Tennessee.

The cases that Appellant cites in support of its position are readily distinguishable from the situation presently before us. In response to Appellees' arguments that any post-trial challenge to the sufficiency of the *ad damnum* clause has been waived, Appellants correctly state that "challenges based on an *ad damnum* clause are properly raised in a defendant's post-trial briefing[,]" however the cases that DCC cite for this proposition involve the appellate review of a specific type of *ad damnum* challenge: one that attacks the propriety of an entry of judgment in excess of a specific dollar amount articulated in the original complaint. *See* ***Russell v. City of Lawrenceburg***, No. 01-A-01-9505-CV-00200, 1995 Tenn. App. LEXIS 703 (Tenn. Ct. App. Nov. 1, 1995); ***Baker v. Kline***, 1988 Tenn. App. LEXIS 579 (Tenn. Ct. App. Sept. 23, 1988).

The rationale for allowing appellate review in such cases is not applicable in this case. A defendant would logically have no basis to support an *ad damnum* challenge to a judgment in excess of a specific amount stated in the complaint until after the entry of judgment that did in fact exceed this amount. In this case, however, DCC's challenge is to the sufficiency of Plaintiffs' *ad damnum* clause itself. DCC could easily have raised such a challenge in their June 2002 answer, at which time the trial court might have allowed Plaintiffs to amend their complaint to state a specific sum. *See, e.g.* ***Roberson v. Motion Indus.***, No. E2004-02310-COA-R3-CV, 2005 Tenn. App. LEXIS 391

(Tenn. Ct. App. July 7, 2005) (plaintiff amended *ad damnum* clause from $2 million to $3.4 million); ***Guess v. Maury***, 726 S.W.2d 906, 908 (Tenn. Ct. App. 1986) (after defendants filed their answers, plaintiffs amended their complaint to increase their *ad damnum* clause). Instead, Appellant chose to pursue this challenge for the first time nearly three years later, after many months of discovery, a trial lasting over two weeks, and even four months after the trial had concluded. We therefore hold that DCC waived this defense under Rule 12.08 of the Tennessee Rules of Civil Procedure.

The trial court denied DCC's motion for a new trial based on the *ad damnum* clause challenge in its June 23, 2005 memorandum opinion. The court found that since "the plaintiffs did state that they were seeking damages in a specific amount 'to be determined by the enlightened conscience of the jury . . . ,'" and since there were "no cases on point in Tennessee that state that when damages are requested, but there is not a specific sum stated, the judgment is void[,]" Plaintiffs had satisfied the requirements of T.C.A. § 29-28-107. Since we have found that DCC waived this defense by not raising it in its answer pursuant to Rule 12.08 of the Tennessee Rules of Civil Procedure, we need not review the correctness of this finding.

B. Negligent Infliction of Emotional Distress

The next issue that Appellants raise for our consideration is whether the evidence offered at trial was sufficient to support an award to Ms. Sparkman for negligent infliction of emotional distress. DCC asserts that it is entitled to judgment on the NIED claim because Ms. Sparkman failed to introduce expert testimony to support this claim. DCC states that because Ms. Sparkman's claim was a "stand-alone" claim, the heightened proof requirements established by our supreme court in ***Camper v. Minor***, 915 S.W.2d 437 (Tenn. 1996), demanded that she put on expert medical or scientific proof of her emotional injury.

Conversely, Ms. Sparkman argues in support of the award that her NIED claim was not a stand-alone claim, but one of "multiple claims for damages," and was thus excepted from the heightened proof requirements of *Camper*. In support of this proposition, she cites ***Estate of Amos v. Vanderbilt University***, in which our supreme court acknowledged that the *Camper* heightened proof requirements did not apply to all NIED claims, but only those determined to be "stand-alone." 62 S.W.3d 133, 137 (Tenn. 2001). Ms. Sparkman rationalizes, and the trial court found, that her claim was one of multiple claims of damages related to the wrongful death claim, including filial consortium, and therefore that the heightened proof requirements for stand-alone claims were not applicable to this NIED claim.

The application of the law to the facts found by the trial court is a question of law that this Court reviews de novo. ***State v. Maclin***, 183 S.W.3d 335, 343 (Tenn. 2006) (citing ***State v. Yeargan***, 958 S.W.2d 626, 629 (Tenn. 1997); ***Beare Co. v. Tenn. Dep't of Revenue***, 858 S.W.2d 906, 907 (Tenn. 1993)). The trial court in the present case, in denying DCC's post-trial motion for judgment notwithstanding the verdict on Ms. Sparkman's NIED claim, agreed with her characterization of the claim as not being "stand-alone." In its June 20, 2005 memorandum opinion, the court stated:

> In this case, the Court finds that expert proof was not necessary since Rachel Sparkman's NIED claim was not a stand-alone claim. Ms. Sparkman's NIED [sic] was derivative of her claim as a co-plaintiff for the wrongful death of Jeremy [sic-Joshua] Flax. In addition to Ms. Sparkman's NIED claim, she also brought a claim for damages resulting from the loss of filial consortium resulting from Joshua's death. Since Ms. Sparkman brought multiple claims for damages, her NIED claim is not considered by the Court to be stand-alone. The Court also finds that there is sufficient evidence to support Ms. Sparkman's NIED claim. The emotional distress of seeing her young child fatally injured in a car accident would clearly meet the requirements of the tort and would be seen as a severe injury. Therefore, the Court is of the opinion that Rachel Sparkman's claim for NIED was properly before the Court and her claim did not require any additional expert proof.

We assign error to the trial court's finding that Ms. Sparkman's claim was not stand-alone, and we therefore hold that Ms. Sparkman failed to meet the proof requirements of *Camper* for a stand-alone NIED claim by not presenting expert medical or scientific proof of her emotional injuries.

In light of the complexities involved when dealing with emotional and mental forms of damages, the legal history of the negligent infliction of emotional distress action in Tennessee is replete with decisions that evince the efforts of our courts to maintain a remedy that strikes a proper balance between the prevention of frivolous suits and the allowance of legitimate claims for emotional damages.[4] In 1996, the Tennessee Supreme Court definitively set forth the requirements for bringing a successful NIED claim in ***Camper v. Minor***, 915 S.W.2d 437 (Tenn. 1996). In ***Camper***, the plaintiff had been operating his truck when a teenage driver, the defendant, had pulled her own vehicle in front of the plaintiff unexpectedly. ***Id.*** at 439. The plaintiff had collided with the defendant, and the defendant was killed instantly. ***Id.*** The plaintiff had approached the defendant's vehicle immediately after the accident and viewed the defendant's dead body in the wreckage. ***Id.*** The plaintiff sued the defendant's estate, claiming that as a result of viewing the body he had "sustained mental and emotional injuries resulting in loss of sleep, inability to function on a normal basis, outbursts of crying and depression." ***Id.*** While the plaintiff had undergone some psychiatric treatment, he did not offer any expert medical evidence of his alleged emotional injuries. ***Id.***

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[4] Early NIED cases in Tennessee, the most notable of which was ***Memphis St. Ry Co. v. Bernstein***, 194 S.W. 902 (Tenn. 1917), held that plaintiffs in these cases needed to prove a physical injury as a result of the emotional distress in order for their claims to be actionable. *See* ***Bernstein,*** 194 S.W. at 903 ("For the bodily pain and suffering produced by such fright and thereby proximately resulting from the accident, a recovery was permissible. For fright alone the plaintiffs below were not entitled to recover, and the charge which authorized a computation of damages based upon fright alone was erroneous . . . .").

The court acknowledged its concern about a developing trend of inconsistent treatment of NIED claims in Tennessee cases over the years, particularly as to whether an accompanying physical manifestation of injury was required. *See* ***Camper***, 915 S.W.2d at 444-46. The court explained that while it had never overruled *Bernstein* and its "physical manifestation" requirement, it had carved out exceptions to this requirement over the years:

> At a very early stage in the law's development, this Court carved out an exception to the physical manifestation rule by holding, in ***Hill v. Travelers Ins. Co.***, 154 Tenn. 295, 294 S.W. 1097 (1927), that a plaintiff could recover for mental damages occasioned by the defendants' mutilation of her husband's dead body during an autopsy, notwithstanding that the plaintiff had neither suffered a contemporaneous physical injury nor exhibited physical symptoms of her alleged mental injuries. This Court explained its departure from the ***Bernstein*** rule by simply stating "that mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument." Hill, 294 S.W. at 1099. *See also* ***Wadsworth v. Western Union Tel. Co.***, 86 Tenn. 695, 8 S.W. 574 (1888) (establishing a similar exception where message carrier failed to deliver telegraphs to plaintiff regarding the imminent death of her brother, thus preventing her from sitting by his bedside when he died).

Camper, 915 S.W.2d 437, 444 (Tenn. 1996). The court went on to explain that the inconsistent treatment of NIED claims under *Bernstein* was not only evident in "creating outright exceptions to the *Bernstein* rule[,]" but that in some cases the Tennessee courts had simply applied the physical manifestation rule "in such a way as to soften its potential harshness." ***Id.*** at 444-45 (citing ***Johnson Freight Lines, Inc. v. Tallent***, 53 Tenn. App. 464, 384 S.W.2d 46 (1964) (where the court shifted its focus to the quality of evidence presented in support of the plaintiff's claim instead of the physical manifestations of injuries); ***Laxton v. Orkin Exterminating Co.***, 639 S.W.2d 431 (Tenn. 1982) (where the plaintiffs had ingested water contaminated with chemicals, and although a medical investigation revealed that no damage had been done, the court held that a jury could conclude that a physical injury had been sustained "when a plaintiff has ingested an indefinite amount of a harmful substance").

In response to what it referred to as the "confusing" and "unpredictable" state of the law surrounding a negligent infliction of emotional distress claim at this time, the ***Camper*** court held that it was time "to abandon the rigid and overly formulaic 'physical manifestation' or 'injury' rule[,]" and set forth a new test for meeting a prima facie case for an NIED claim in Tennessee. ***Camper***, 915 S.W.2d at 446. The court held that this type of claim was to be addressed under a general negligence approach, and further expounded:

> In other words, the plaintiff must present material evidence as to each of the five elements of general negligence -- duty, breach of duty, injury[,] or loss, causation in fact, and proximate, or legal, cause[. . .]-- in order to avoid summary judgment. Furthermore, we agree that in order to guard against trivial or fraudulent actions, the law ought to provide a recovery only for "serious" or "severe" emotional injury.[. . .] A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[. . .] Finally, we conclude that the claimed injury or impairment *must be supported by expert medical or scientific proof*.[. . .]

Camper, 915 S.W.2d at 446 (emphasis added) (citations omitted). The *Camper* court then remanded the case to the trial court for further proceedings. ***Camper***, 915 S.W.2d at 446.

In ***Estate of Amos v. Vanderbilt University***, 62 S.W.3d 133 (Tenn. 2001), plaintiff Julie Amos (Amos), was a woman who had, prior to the establishment of HIV-testing procedures for blood used in transfusions, contracted the HIV virus after receiving a transfusion of contaminated blood from the defendant hospital in 1984. ***Estate of Amos***, 62 S.W.3d at 135. Years later, while still unaware of her HIV-positive status, Amos gave birth to a child who had contracted the virus *in utero*, and the child died of an AIDS-related illness about a month later. ***Id.*** at 135. In 1991, Amos and her husband brought an action against the hospital, asserting multiple claims for damages including wrongful birth, negligence, and negligent infliction of emotional distress. ***Id.*** In 1992, Amos died of AIDS, and her husband continued her claims on the behalf of her estate, alleging that the hospital was liable for its failure to warn Amos of her possible infection. ***Id.*** After a jury verdict, the trial court held that the estate's award for emotional injuries could not stand because the plaintiffs had not presented expert or scientific testimony of serious or severe emotional injury as required by *Camper*, and the court reduced the jury award to reflect only the amount of Amos's medical and funeral expenses. ***Id.***

Upon review, the defendants in *Estate of Amos* urged the Court of Appeals to affirm the trial court's decision on NIED, because the plaintiffs had not satisfied *Camper*'s requirements of "expert medical or scientific proof and serious or severe injury.***"** ***Id.*** at 136. The court explained: "The special proof requirements in *Camper* are a unique safeguard to ensure the reliability of 'stand-alone' negligent infliction of emotional distress claims." ***Id.*** at 136-37. The court went on to state that "[w]hen emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims." ***Id.*** at 137. The court characterized *Camper* as contemplating "a plaintiff who was involved in an incident and received only emotional injuries." ***Id.*** Noting that the plaintiffs' claims for wrongful birth and negligent failure to warn included "a request for damages for emotional injuries stemming from those causes of action as well as a request

for other damages[,]" the court found that the plaintiffs' NIED claim was not "stand-alone," and therefore the heightened proof requirements of *Camper* did not apply. **Id. at 137-38.**

In ***Dodson v. Saint Thomas Hospital***, No. M2004-01102-COA-R3-CV, 2005 WL 819725 (Tenn. Ct. App. Apr. 7, 2005), a case arising after *Estate of Amos*, the appellant had been fired from her job at a hospital, and she sued the hospital and two employees alleging both intentional and negligent infliction of emotional distress. ***Id.*** at *1. After affirming the trial court's granting of a summary judgment motion in favor of the defendants on the intentional infliction of emotional distress claim, we turned to the negligent infliction of emotional distress claim in light of precedent:

> As to the claim for negligent infliction of emotional distress, our Supreme Court has outlined the prima facie case for negligent infliction of emotional distress. In order to make such a case, the plaintiff must prove the elements of duty, breach of duty, injury or loss, causation in fact, and proximate cause. *See* ***Camper v. Minor***, 915 S.W.2d 437, 446 (Tenn.1996). In *Camper*, the Court further held that recovery for negligent infliction of emotional distress claims, *where there is no physical injury*, is limited to serious or severe emotional injury supported by expert medical or scientific proof. ***Id***. From our review of the record, Ms. Dodson has provided no scientific or medical proof to meet the burden of establishing an injury under this tort. Consequently, summary judgment was correct on these causes of action.

Id. at *8 (emphasis added). The expert proof requirement of *Camper* has been similarly noted in other NIED cases in Tennessee. *See, e.g.*, ***Lourcey v. Estate of Scarlett***, 146 S.W.3d 48, 52 (Tenn. 2004) (stating that in Tennessee, an NIED claim requires "that the plaintiff establish the elements of a general negligence claim: (1) duty, (2) breach of duty, (3) injury or loss, (4) causation in fact, and (5) proximate causation. . . In addition, the plaintiff must establish the existence of a serious or severe emotional injury that is supported by expert medical or scientific evidence. . . ." (citations omitted)); ***Miller v. Willbanks***, 8 S.W.3d 607, 614 (Tenn. 1999) (recognizing "that legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury" and holding that "when the conduct complained of is negligent rather than intentional, the plaintiff must prove the serious mental injury by expert medical or scientific proof"(citing ***Camper***, 915 S.W.2d at 446)).

We believe that the facts of the present case correspond more closely with *Camper* than with *Amos*. Accordingly, the policies articulated in *Camper* lead us to conclude that Ms. Sparkman did not satisfy the prima facie case for an NIED action in Tennessee. The precedent concerning the proof requirements for NIED claims suggests that when there are not multiple claims for damages by a plaintiff that would deem an NIED cause of action "parasitic," the action is stand-alone, and the heightened proof requirements set forth in *Camper* will control. *See* ***Dodson***, 2005 WL 819725, at *8; *accord* ***Estate of Amos***, 62 S.W.3d at 137 ("The subjective nature of 'stand-alone' emotional

injuries creates a risk for fraudulent claims."); *see also* ***Isabel v. Velsicol Chemical Co.***, 327 F. Supp.2d 915, 920 (W.D. Tenn. 2004) ("Notwithstanding the general language of *Amos*, under ***Laxton***[, 639 S.W.2d 431], it appears that emotional distress damages may not be 'parasitic' upon property damages alone, because the plaintiffs in *Laxton* suffered property damage based upon diminished value, but the Court still required them to prove some de minimis 'physical injury'. . . ."); *but see* ***Riley v. Whybrew***, 185 S.W.3d 393, 401 (Tenn. Ct. App. 2005) (holding that a claim for property damage under a nuisance theory is enough to prevent an accompanying NIED claim from being stand-alone).

While the record reflects that Ms. Sparkman received minor injuries in the accident, including bruises on her legs, a pulled muscle from holding onto the armrest, and a knot on the back of her head, she sought no recovery for these physical injuries. Ms. Sparkman similarly sought no recovery for any property damage that might have deemed the NIED claim "parasitic" under our analysis in ***Riley***, 185 S.W.3d at 401. Ms. Sparkman never offered expert proof of any emotional injuries that might have resulted from her viewing Joshua after the accident. The testimony of Dr. Joseph Burton, a forensic pathologist who testified about the injuries to Joshua from the accident, was asked no questions about Ms. Sparkman's emotional injuries, so he provided no insight for the jury in this regard.

Camper stated that "[a] 'serious' or 'severe' emotional injury occurs 'where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'" ***Camper***, 915 S.W.2d at 446 (citing ***Rodrigues v. State***, 472 P.2d 509, 520 (Haw. 1970); ***Paugh v. Hanks***, 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (Ohio 1983); ***Plaisance v. Texaco, Inc.***, 937 F.2d 1004, 1010 (5th Cir. 1991); PROSSER AND KEETON ON THE LAW OF TORTS, § 54, at 364-65, n. 60). During cross-examination, Ms. Sparkman testified that she had received no professional counseling for emotional injuries sustained from the accident. DCC counsel asked Ms. Sparkman, "You have coped with it as best you could on your own?", to which she replied, "I have friends and family that helped me through it."

Furthermore, since the NIED claim was brought as the sole claim by Ms. Sparkman individually, and as a cause of action distinct from the wrongful death claim, which sought filial consortium damages and was brought by the parents jointly, it would be difficult for us to characterize her claim in any way other than stand-alone. Together with the lack of claims for physical injuries or property damages, the separate nature of these claims persuades us to find that Ms. Sparkman's NIED claim was not "parasitic" of the wrongful death claim, but was instead a stand-alone cause of action brought by Ms. Sparkman individually. Therefore, the NIED claim was not one of "multiple claims for damages" as contemplated by ***Estate of Amos***, 62 S.W.3d at 137. Since Ms. Sparkman's NIED claim is one "for a purely mental injury," we believe that it is a stand-alone claim. *See* ***Miller***, 8 S.W. 3d at 614 ("legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury"). As such, it was necessary for Ms. Sparkman to present expert proof of her emotional injuries in order to establish a *prima facie* case for NIED.

While it is difficult for this Court to comprehend the emotional effects of seeing the effects of such a catastrophic injury to one's child after an automobile accident, we believe that to affirm the compensatory and punitive awards for Ms. Sparkman's NIED claim would be in contravention of the proof requirements for a stand-alone NIED claim brought in Tennessee in light of *Camper* and its progeny. For these reasons, we reverse the compensatory and punitive portions of the judgment that correspond with this claim as to defendant DCC.

However as to defendant Stockell, the negligent driver whose truck collided with the Caravan and who neglected to cooperate with the parties during trial and has not joined in this appeal, we affirm the portion of the compensatory NIED award for which he was found liable. As the Western Section of this Court recently held in ***Mairose v. Fed. Express Corp.***, No. W2005-01527-COA-R3-CV, 2006 Tenn. App. LEXIS 598, at *18-19:

> Generally, "[a] reversal is binding on the parties to the suit, but does not control the interests of parties who did not join, or were not made parties, to the appeal . . ." 5 C.J.S. APPEAL & ERROR § 961 (1993). However, when a non-appealing parties' "rights and liabilities and those of the parties appealing are so interwoven and dependent as to be inseparable, . . . a reversal as to one operates as a reversal as to all." Id. In such case, "[w]here less than all of the coparties appeal from a severable judgment in which the interests of the parties are independent, only the part of the judgment pertaining to appellants may be reversed." Id. § 930; see also ***Rogers v. Bouchard***, 60 Tenn. App. 555, 449 S.W.2d 431, 438 (Tenn. Ct. App. 1969).

Defendant Stockell did not file an appellate brief with this Court or otherwise join in this appeal. As noted above, Stockell's fault was pre-determined by the trial court in response to his repeated failures to respond to interrogatories or appear at depositions during discovery. In its final order, the trial court entered a judgment against Stockell for $1,250,000 in compensatory damages, which represented his 50% liability on Ms. Sparkman's NIED claim. As we have found that Stockell's rights and liabilities are not so interwoven with or dependent upon those of DCC as to be inseparable, we affirm the compensatory award of $1,250,000 against him and in favor of Ms. Sparkman individually.

C. Post-Sale Duty to Warn

DCC's also assigns error to the trial court's decision to allow the post-sale duty to warn claim to be presented to the jury as an additional theory of liability against DCC. Appellant argues that the decision by this Court in ***Irion v. Sun Lighting, Inc.***, No. M2002-00766-COA-R3-CV, 2004 Tenn. App. LEXIS 210 (Tenn. Ct. App. Apr. 7, 2004), established that Tennessee does not recognize a manufacturer's post-sale duty to warn. DCC argues that it was deeply prejudiced by the court's

recognition of this theory.[5] The first reason, which we shall address in this section, is that the trial court allowed Plaintiffs to impose an additional basis for liability on the wrongful death and NIED claims, in contravention of precedent by this Court in the *Irion* decision.

Appellees counter this theory of error by arguing that *Irion* did not hold that Tennessee would never recognize a post-sale duty to warn, but that it "simply considered the touchstones for post-sale duty to warn set forth in the Restatement (Third) of Torts, noted that Tennessee had not adopted the Restatement, and found that, in any event, the evidence did not satisfy the requirements of the Restatement [(Third)]." Plaintiffs argue that this issue is a matter of "purely academic" interest, but vaguely add that they "can hardly imagine a record more suitable to the recognition of that claim." Appellees provide no guidance, however, as to why the instant case is so particularly well-suited to our adoption of this new theory of recovery in Tennessee.

We believe that our statements in ***Irion v. Sun Lighting, Inc.***, No. M2002-00766-COA-R3-CV, 2004 Tenn. App. LEXIS 210 (Tenn. Ct. App. Apr. 7, 2004) are dispositive of this issue. In that case, a plaintiff sought recovery against a lamp manufacturer and a seller of the lamp after her child had placed a pillow over the lamp and started a fire, which resulted in property damage. ***Id***. at *1-2. The plaintiff mother brought a products liability suit alleging negligence, strict liability in tort, and breach of implied warranty by the defendants, because the lamp was not equipped with a protective guard over the bulb to prevent combustible materials from catching fire. ***Id.*** at *2. The plaintiff also proposed several other reasons for imposing liability on the defendants, including the related claims of failure to conduct post-sale testing and breach of a post-sale duty to warn. ***Id.*** at *52-53. In affirming the trial court's grant of summary judgment for the defendants, this Court stated:

> To the extent she also claims that there was a post-sale duty to warn, we note that, like the majority of states, *Tennessee does not recognize a post-sale duty to warn*. Although the Restatement (Third) of Torts adopts some post-sale duties, Tennessee had [sic] not adopted those provisions and, in any event, Ms. Irion's proof would not trigger those duties.

Irion, 2004 Tenn. App. LEXIS 210, at *53 (citing Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 21 (1999)).

T.C.A. § 20-9-502 (2006) provides: "If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts." Tennessee courts have held on the basis of this statute "that a trial court's erroneous instruction on one count of a multi-count suit is harmless

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[5] Appellants also argue that the jury finding of recklessness in its Phase I deliberation, which in turn would facilitate the award of punitive damages, could have improperly been based upon the post-sale duty to warn theory through the admission of evidence relating to other occurrences of seat failure that occurred after the sale of the Caravan in May of 1998. We address this argument in Section E, below.

error if its instructions as to the other counts were proper." ***Tutton v. Patterson***, 714 S.W.2d 268, 271 (Tenn. 1986) (citing ***Tenn. Cent. Ry. Co. v. Umenstetter***, 155 Tenn. 235, 237, 291 S.W. 452, 452-53 (1927); ***Bloodworth v. Stuart***, 221 Tenn. 567, 577, 428 S.W.2d 786, 792 (1968)). In Tennessee, "we review the jury charge in its entirety and consider it as a whole in order to determine whether the Trial Court committed prejudicial error. The charge will not be invalidated as long as it fairly defines the legal issues involved in the case and does not mislead the jury." ***Cruze v. Ford Motor Co.***, No. 03A01-9907-CV-00245, 1999 Tenn. App. LEXIS 833, at *6-7 (Tenn. Ct. App. Dec. 16, 1999) (citing ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 446 (Tenn. 1992)). Tennessee Rule of Appellate Procedure 36(b) provides for appellate relief only when an error has more likely than not resulted in prejudice to the party. TENN. R. APP. P. 36(b). If no error has occurred, or if the errors that did occur were harmless, then we must affirm the judgment. ***Union Planters Nat'l Bank***, 43 S.W.3d at 501 (citing ***Doochin v. U.S. Fid. & Guar. Co.***, 854 S.W.2d 109, 112 (Tenn. Ct. App. 1993)).

Tennessee, like the majority of states, does not recognize a post-sale duty to warn. ***Irion***, 2004 Tenn. App. LEXIS 210, at *53. We have found no cases arising after the *Irion* decision that have addressed the particular facts or evidence that might encourage us to adopt this theory of recovery in Tennessee. Appellees' alternative theory of recovery against DCC for the breach of a post-sale duty to warn of possible dangers or defects in its minivan seats should not, therefore, have been submitted to the jury. We find error in the trial court's instruction to the jury on this claim. However, because we find that the trial court correctly instructed the jury on Plaintiffs' remaining theories of recovery under their wrongful death claim, specifically strict liability and negligence, we view its instruction on a post-sale duty to warn claim as harmless error, and we affirm the entry of judgment for Plaintiffs as to the jury's wrongful death compensatory award.

D. Evidentiary Errors and Discovery Abuse

DCC assigns error to the trial court's admission of "other incidents" evidence regarding minivan seatback accidents that the trial court found to be substantially similar to the Flax accident, but which Appellant describes as "irrelevant." DCC alleges that the trial court erroneously deviated from its own articulated standard[6] for substantial similarity when it admitted 37 of these "other

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[6] At a preliminary motion hearing held on October 25, 2004, the trial court provided the following guidelines for a "substantially similar" incident in this case:

> But I can say that a substantial similarity in this case would be a rear-end collision between two moving vehicles with catastrophic injuries. I won't limit that to passengers in the rear or the middle seats but also to the front seats. If you can cull that down, I would appreciate it.
>
> As far as the force is concerned, it would have to be reasonably near the Delta V forces that happened in this case.

(continued...)

similar incidents" (OSI's) into evidence. DCC claims that the trial court also erred in its exclusion of DCC's "real world accident data," which Appellant describes as "highly relevant when evaluating a particular design choice." Furthermore, DCC alleges that Plaintiffs' failure to provide them with certain crash test results of the dual recliner "RS"[7] seat, conducted by Plaintiffs' expert Saczalski for another case in which he testified, prejudiced them and warrants a new trial, which was denied them by the trial court.

Appellees argue that they made a sufficient showing of substantial similarity of the 37 OSIs when offering them into evidence in pretrial conferences. They say that this evidence was extremely relevant in their case against DCC, not only in showing that the defendant had notice of a problem with its NS minivan seats, but also in establishing the existence of a defect in these seats with regard to the strict liability claim. Appellees claim that DCC's "real world accident data" was properly excluded by the trial court because DCC did not attempt to make a showing of substantial similarity of the accidents reflected in this data to the Flax accident. Appellees dispute that Saczalski's failure to discover the RS tests warrants a new trial, because the RS seats were not the "safe, non-defective, feasible alternative design advocated by" Plaintiffs and Saczalski. Instead, Appellees insist that the alternative design that Saczalski recommended was the 1996 Sebring seat, which expert testimony amply supported as a stronger alternative to the NS.

1. Admissibility of 37 Other Similar Incidents

"Generally, the admissibility of evidence is within the sound discretion of the trial court." ***Mercer v. Vanderbilt Univ., Inc.***, 134 S.W.3d 121, 131 (Tenn. 2004) (citing ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 442 (Tenn. 1992)). "The trial court's decision to admit or exclude evidence will be overturned on appeal only where there is an abuse of discretion." ***Id.*** "Under the abuse of discretion standard, a trial court's ruling 'will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.'" ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (citing ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000); ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000)). "A trial court abuses its discretion only when it 'applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining.'" ***Id.*** (citing ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999)). "The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court." ***Id.*** (citing ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998)).

"Evidence is relevant and therefore admissible if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" ***Biscan v. Brown***, 160 S.W.3d 462, 468 (Tenn. 2005) (citing TENN. R. EVID. 401). "Evidence that is relevant under Rule 401 may be excluded 'if its

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[6](...continued)

[7] The RS minivan seat design followed the NS design, and was implemented into DCC minivans beginning in the year 2001.

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .'" ***Id.*** (citing TENN. R. EVID. 403). The key provision of the Tennessee Products Liability Act provides as follows: "[a] manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller." T.C.A § 29-28-105(a) (2006); ***Whitehead v. Toyota Motor Corp.***, 897 S.W.2d 684, 689 (Tenn. 1995). "Defective condition" is defined at T.C.A. § 29-28-102(2) (2006) as "a condition of a product that renders it unsafe for normal or anticipatable handling and consumption." "Unreasonably dangerous" is defined in T.C.A. § 29-28-102(8) (2006), which states:

> [u]nreasonably dangerous means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller assuming that the manufacturer or seller knew of its dangerous condition.

Admissibility of evidence of other accidents is a common issue arising in negligence and products liability cases. 1 MCCORMICK ON EVIDENCE § 200, at 800 (Kenneth S. Broun ed., 6th Practitioner's Ed. 2006). In Tennessee, "evidence of other accidents is admissible at trial for two purposes: (1) to show the existence of a particular dangerous condition or (2) to show the defendant's knowledge of the dangerous condition." ***Stroming v. Houston's Restaurant, Inc.***, No. 01A-01-9304-CV-00189, 1994 WL 658542, at *2 (Tenn. Ct. App. Nov. 23, 1994) (citing ***John Gerber Co. v. Smith***, 150 Tenn. 255, 266, 263 S.W.974, 977 (1924); ***Winfree v. Coca-Cola Bottling Works,*** 19 Tenn. App. 144, 147, 83 S.W.2d 903, 905 (1935); ***Ellis v. Memphis Cotton Oil Co.***, 3 Tenn. Civ. App. (Higgins) 642, 650 (1913)). Cases in Tennessee have also held that accidents occurring after the one in question may be admissible to show the dangerous nature of the product in question:

> Where the dangerousness or safe character of the place, method, or appliance which is alleged to have caused the accident or injury is in issue, evidence is admissible in a proper case that other similar accidents or injuries, actual or potential, have *therefore, or at the same time, or thereafter* resulted at or from such place, method, or appliance.

Winfree, 19 Tenn. App. at 147, 83 S.W.2d at 905 (emphasis added), Petition for Certiorari Denied by Supreme Court, June 10, 1935; *see also* ***Graham v. Cloar***, 205 S.W.2d 764 (Tenn. Ct. App. 1947), Petition for Certiorari Denied by Supreme Court October 3, 1947. "If the evidence is being offered to show the existence of a particular hazard or danger, the party seeking to use the evidence must lay a foundation establishing substantial similarity between the prior accidents and the present accident." ***Stroming***, 1994 WL 658542, at *2 (citing ***John Gerber Co. v. Smith***, 150 Tenn. at 266,

263 S.W. at 977). The similarity requirement does not require that the circumstances of the accidents be identical in every particular. ***Id.*** at *3 (citing 1 MCCORMICK ON EVIDENCE § 200, at 844 n. 4 (John W. Strong ed., 4th Practicioner's Ed. 1992). Sufficient proof of substantial similarity requires

> a showing that the condition or instrumentality that caused the earlier accidents was in substantially the same condition at the time of the earlier accidents as it was at the time of the present accident. ***John Gerber Co. v. Smith***, 150 Tenn. at 268, 263 S.W. at 977; ***Martin v. Miller Bros. Co.***, 26 Tenn. App. 110, 117, 168 S.W.2d 187, 189-90 (1942). It also requires that the condition or instrumentality shown to be the common cause of the earlier accidents must also be the condition or instrumentality of the present accident. ***Turgeon v. Commonwealth Edison Co.***, 630 N.E.2d 1318, 1322 (Ill. App. Ct. 1994).

Id. at *3. "The sufficiency of the showing of similarity of conditions is primarily a matter for the discretion of the trial judge." ***Barrett v. Raymond Corp.***, No. 59, 1991 Tenn. App. LEXIS 38, at *4 (Tenn. Ct. App. Jan. 24, 1991) (citing ***Powers v. J. B. Michael & Co.*, Inc.**, 329 F.2d 674 (6th Cir. 1974)).

It is clear from the evidentiary history of this trial that the "condition or instrumentality" considered by the trial court in weighing substantial similarity was the collapse, or yield, of the NS seat that led to the fatal injury to young Joshua. Plaintiffs obtained through discovery a large number of documents from DCC related to hundreds of cases of failure of the NS seats involved in the Flax accident.[8] The judge instructed Plaintiffs to narrow down the "other similar incidents" (OSI's) to only those which could be established as substantially similar to the Flax incident, specifically as to the type of seat involved, the type of accident (rear-end collisions), the degree of injury of the parties, and the force of the collision between the vehicles involved, or "Delta V."[9]

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[8] The Sharing Protective Order filed on August 6, 2002, dealt with the discovery of these documents.

[9] At trial, plaintiff expert Kirk defined "Delta V" as follows:

> Delta is a Greek symbol meaning change. Delta V means change in velocity. Also referred to as speed change or velocity change. In accident reconstruction we're generally talking about an impact.
> . . .
> It's simply the change in the speed of the vehicle that occurs during an accident. It's a measure of impact severity.

In Kirk's estimation, based upon the damage to and position of the vehicles after the accident and from his own reconstruction, the Flax minivan had been traveling at between 10-15 miles per hour, and Stockell's truck had been (continued...)

In its efforts to determine which documents would be admitted, the trial court conducted several days of pre-trial conferences in which it allowed counsel for Plaintiffs to make a showing of substantial similarity of each incident to the Flax seat and incident, while allowing counsel for DCC to argue in support of their numerous motions in limine in support of excluding the documents concerning incidents that they believed to be dissimilar. By the time the trial began on November 2, 2004, the trial court had admitted into evidence 37 OSI's that were deemed substantially similar to the Flax incident.[10]

We find that the trial court did not abuse its discretion in allowing into evidence the 37 accidents designated as OSI's and submitted by Plaintiffs. The record reflects that the trial court devoted a considerable amount of time to allow counsel for both parties to voice their support for or objections to this evidence. It is practically indisputable that the injuries occurring in all 37 of these cases were caused by the backward motion of minivan seats, which Plaintiffs sufficiently showed, in each case, to be substantially similar to those at issue in the Sparkmans' vehicle. Therefore, with regard to the trial court's admission of these 37 other accidents as evidence of dangerousness of the NS seat, we affirm the trial court's rulings.[11]

2. Exclusion of "Real-World" Accident Data

DCC also alleges that the trial court erred by refusing to admit, during Phase I, "real-world accident data," specifically data from a NHTSA-run system called "NASS," that would aid its case in showing the jury that rear-end fatalities such as the one in this case "are exceedingly rare and account for only 3 percent of all traffic crash fatalities." According to DCC's expert Mike James, "NASS is a system that is run by NHTSA, by the government agency, where they systematically investigate automobile accidents throughout the country for the purpose of generating field accident data that can be used by researchers, both within the agency and other researchers[,] to evaluate how vehicles perform in real world accidents." Appellant's counsel made an offer of proof for this

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[9](...continued)
traveling between 50-55 miles per hour at the time of collision. Kirk estimated the Delta V of the collision to be "[a]pproximately 17 to 19 miles per hour."

[10] Upon this Court's review of the expansive record, we perceive the 37 incidents determined by the trial court to be substantially similar as: Amberson, Baird, Bajalia, Basa, Bennett, Berthelson, Bridwell, Buss, Butler, Chism, Collins, Comella, Corrigan, Crawford, Dize, Fortney, Hanifee, Henckel, Jones, Kinsey (Odyssey), Labelle, Martin, McCloskey, McCurdy, McMillan, McNeely, Middleton, Munoz, Neal, Persak, Prestridge, Rich, Robinson, Sauceda, Spires, Stanley, and Toothaker.

[11] All 37 of the OSI's, even those occurring after the purchase of the van in 1998 and the accident in 2001, were admissible as evidence of dangerousness of the NS seat. ***Winfree***, 19 Tenn. App. at 147, 83 S.W.2d at 905. However, we find that only 12 of the OSI's occurred prior to the purchase of the Caravan in May of 1998, and therefore only these 12 OSI's should have been admitted for the dual purpose of showing dangerousness *and* notice to DCC. In the next section, we discuss how the trial court's failure to provide a limiting instruction to this effect may have affected the jury in its finding of recklessness.

evidence before Phase I of the trial began. DCC argued in support of this evidence:

> There is no need to prove substantial similarity. I think we all agree on that, unless you are going to offer it to prove the existence of defect or knowledge on the part of the defendant. . .
>
> We have to show why we made the design choices that we made. And while plaintiffs want to focus on simply rear impacts that injured children, we don't have that luxury as the manufacturer and designer of these seats. . .
>
> So Mr. James' statistical analysis is dissimilar on purpose because we have to show to the jury what kind of harm can happen to occupants in not just the accidents that plaintiffs focus on, rear impacts in which children are hurt, but why we chose the design we did because of the variety of accidents that can occur.
>
> Mr. James is an engineer and he has participated in testing. He is entitled to say that the seats are not unreasonably dangerous and not in a defective condition. He is entitled to say that separate and apart from the statistical analysis that he has undertaken – the statistical analysis simply goes to show the jury what kind of harm can occur in rear-end impacts, what kind of harm can occur in frontals, roll-overs, you name it, with whatever kind of occupant and whatever restraint situation you're talking about.
>
> And why DaimlerChrysler decided that out of all of those accidents, the yielding seat produces less harm for occupants than a stiffer seat and that's why they made the design choice they did.

At this pre-trial conference, the trial court granted Plaintiffs' motion in limine to exclude the evidence, but allowed DCC the option of making another offer of proof during Phase II.

At trial, DCC called Mike James to the stand and sought to introduce evidence of the infrequency of vehicular fatalities from seat yielding in rear-end accidents, based upon a study that James had conducted through his analysis of the NASS database. During its direct examination of James, DCC made another offer of proof of the NASS data outside of the jury's presence. During Plaintiffs' cross examination of James, the following exchange occurred:

> Q. Have defense counsel told you that Judge Gayden has already laid down the parameters touched on for what is or is not substantially similar for this trial?
>
> A. No.

Q. So you haven't even discussed that with defense counsel?
A. No. I was told that my analysis of the NASS data was not allowed in.
Q. You're proposing to show this jury some charts based upon other wrecks, and you have not even discussed with defense counsel what the Court has already ruled with respect to what has to be proved before you can talk about other wrecks in this trial? You didn't even talk about that?
A. I have not had a discussion about any type of ruling as to what constitutes substantially similar.

The NASS database upon which James relied upon for his statistical studies contained, by his assessment, in the range of 100,000 different accidents of all types, not just rear-end accidents, involving all types of vehicles.

Neither party has cited to a case in Tennessee state courts in which the parameters have been established for a defendant to introduce the absence or infrequency of accidents as being relevant to the existence or nonexistence of a dangerousness or defect, or as having a bearing on the rationale of a manufacturer for choosing certain design requirements over others. The Sixth Circuit, however, has stated:

> The lack of prior accidents or claims may be admissible to prove the following: (1) the absence of the defect or condition alleged; (2) the lack of a causal relationship between the injury and the defect or condition charged; (3) the nonexistence of an unduly dangerous situation; or (4) want of knowledge (or of grounds to realize) the danger.

Hines v. Joy Mfg. Co., 850 F.2d 1146, 1154 (6th Cir. 1988) (citing E. Cleary, MCCORMICK ON EVIDENCE § 200 (3d ed. 1984)).

DCC did not specifically articulate any of these reasons for admitting the NASS data in either of its offers of proof at trial, but rather attempted to have the evidence admitted to illustrate the enormous number of variables that a manufacturer must consider when making safety design choices. Ultimately, the trial court stated that the evidence was "just too broad to be relevant" in Phase One. Once again, with regard to our standard of review when considering a trial court's decisions related to evidentiary matters, our supreme court has held:

> In Tennessee[,] admissibility of evidence is within the sound discretion of the trial judge. When arriving at a determination to admit or exclude even that evidence which is considered relevant[,] trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion.

Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). We believe that this determination did not constitute an abuse of discretion, and therefore we affirm the decision of the court below to exclude this evidence.

3. DCC's Motion for a New Trial Based Upon Discovery Abuse

DCC moves this Court for a new trial based upon discovery abuse by Plaintiffs in their failing to disclose results from sled tests run on the DCC RS seat in 2002 by their expert witness, Dr. Kenneth Saczalski, during his involvement in a different case against the company. DCC did not discover these results until after trial, and it moved for a new trial. The trial court, in its post-trial memorandum decision, found that Saczalski had admitted in a deposition for another case that during his testing of the Sebring seats, under similar conditions as the accident in the Flax case, "the dummy in the RS dual recliner seat had made contact with the 3-year old surrogate dummy." The trial court found that "Plaintiffs did not disclose a series of RS sled tests conducted by Dr. Saczalski to Defendant DaimlerChrylser." The trial court stated: "The Court finds that the focal point for the discovery abuse was whether or not there was a reasonable alternative to the NS minivan seat. The fact is that DaimlerChrysler manufactured a safer alternative to the NS seat in the Chrysler Sebring vehicle." The court nonetheless sanctioned Plaintiffs under Rule 37 of the Tennessee Rules of Civil Procedure for abuse of the discovery process, denying Plaintiffs "any and all discretionary costs for failing to discover the RS sled tests conducted by Dr. Saczalski in the *Neal* case[,]" but denied DCC's motion for a new trial, finding that "discovery of the RS sled tests would not have affected the outcome of the trial."

"Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." TENN. R. APP. P. 13(d). "A new trial will be granted on account of newly discovered evidence only when it is evident that an injustice has been done and a new trial will change the result." ***McCollum v. Huffstutter***, No. M2002-00051-COA-R3-CV, 2002 Tenn. App. LEXIS 711, at *19 (Tenn. Ct. App. Oct. 8, 2002). In ruling on a motion for new trial on the grounds of newly discovered evidence, the trial court is vested with wide discretion and its denial of such a motion will not be disturbed by an appellate court unless it has abused its discretion. ***Id.*** (citing ***Evans v. Evans***, 558 S.W.2d 851, 853 (Tenn. Ct. App.1977)).

Aside from the implausible notion that a corporation of DaimlerChrysler's size and reputation would need to rely upon crash tests conducted by an individual plaintiff's expert in order to facilitate a fully informed preparation of its case, we find DCC's arguments in support of a new trial on this issue to be without merit. Although Plaintiffs did argue that the dual recliner RS design was stronger than that of the NS at issue in this case, their expert Saczalski testified that, in his opinion, these seats were still defective:

By Mr. Sutter:

Q. Sir, are you endorsing every one of the seats set forth in paragraph 48 [which includes the 2001 RS seat] of your affidavit as nondefective?
A. No, I didn't say that. I said that those would change the outcome to Joshua Flax based on my analysis and testing.
Q. They are still defective though?
A. Yes. In my opinion, they don't provide enough protection for the larger number of people in the population and other more severe accidents than what we have here in Flax.

The 1996 Sebring and the 1998 Ram "belt integrated seat" design was the feasible alternative that Plaintiffs advocated, because unlike the RS seats, these seats were much stiffer and did not "collapse rearward, endangering rear seat occupants."

We agree with the trial court's finding that, regardless of the performance of the RS seats that were added to DCC minivans in 2001, there was a safer alternative design to the NS seat in the 1996 Sebring seat. Testimony provided by DCC's own experts and internal corporate documents admitted into evidence suggest that the company was aware that their own Sebring seats performed better than the NS seats in rear-end crash tests. For example, a 1996 document detailing rear-end crash test results of the Sebring seats by Chrysler's Seat Tech Club stated, "[t]he front seats have performed very well in impact tests, including rearward directions." Neville D'Souza provided testimony, regarding his preparation of a document that compared the performance of DCC seats compared to seats of other companies**,** which corroborated this assertion upon examination by Plaintiffs' counsel:

Q. And under '96 JX, that's the Sebring; is that correct?
A. Yes.
Q. That's the vehicle that has the all-belts-to-seats design?
A. Yes.
Q. You've written meets dynamic requirements; right?
A. Yes.
Q. But under '96 NS, which is the minivan; correct?
A. Yes.
Q. There is a blank; correct?
A. Yes.

During cross-examination of defense expert David Blaisdell at trial, he admitted the following in response to Plaintiffs' counsel's description of the Sebring seat performance:

Q. You've looked at the Sebring seat test and they don't yield or recline into the rear compartment of the passenger compartment; correct, sir?
A. At their Delta V of 15 or 16 that they were tested at, that's correct.

Q. And the Sebring belt-to-seat seat I believe you testified in static test would test out at some 40 to 50,000 inch pounds;[12] correct, sir?
A. That's probably right.

DCC's other expert witness, Mike James, testified on cross-examination as follows:

Q. Now, isn't it true, sir, that in your opinion if DaimlerChrysler Corporation had put stronger front seats in Jim and Sandra Sparkman's 1998 Dodge Caravan like the Sebring seats, Joshua Flax would be alive today?
A. I don't think he would have had this injury in this accident. I guess I can't testify to what would happen otherwise.
Q. That's fair enough. If DaimlerChrysler had put in the Sparkmans' Dodge Caravan stronger seats like it already had, Joshua Flax would have had no injury in this wreck; isn't that true?
A. Right. There would have been different injuries and different accidents, but it wouldn't have been this injury in this accident.

We find that the evidence preponderates in favor of the trial court's finding that DCC manufactured a safer alternative to the NS seat in the 1996 Sebring. Therefore, we believe that the discovery of the RS tests would not have affected the outcome of this trial, as the RS seat was not Plaintiffs' most preferred design. We find that the trial court's resolution of this issue, in denying Plaintiffs discretionary costs as a sanction, was an appropriate use of discretion. We affirm the trial court's denial of DCC's motion for a new trial on this issue.

E. Evidence Supporting a Finding of Recklessness

DCC challenges the substantial award for punitive damages under several theories of error. Appellant asserts that its conduct in designing, marketing, and testing its NS seats does not meet the requisite standard for imposing punitive damages in Tennessee, which is the case "involving only the most egregious of wrongs." Appellants challenge the finding of recklessness by the jury in their Phase I verdict, claiming that the record does not support a finding of clear and convincing evidence of conscious wrongdoing. DCC alleges that the Plaintiffs' position, that DCC knew that the NS seats were dangerous to certain passengers in certain accidents, and that differently designed seats were available to DCC and would have been safer in these accidents, ignores the multitude of concerns that its engineers must address when creating a product that will provide the most safety to its consumers. DCC points to the fact that its NS seats exceeded the federal safety standards established

[12] This is in stark contrast to the performance of the NS seats, which tested at between 7,000 and 8,200 pounds per inch of torque.

by NHTSA for seat strength in accidents, and that this further illustrates the lack of reprehensible conduct that would warrant punitive damages. DCC also challenges the trial court's handling of the post-sale failure to warn claim as it was presented to the jury. Appellant notes that this product liability tort has not been adopted in Tennessee, and that the jury should have not been instructed to consider it prior to its deliberation at the end of Phase I of the trial.

In 1992, the Tennessee Supreme Court set forth the standard that must be met in order for punitive damages to be imposed against a defendant. *See* ***Hodges v. S.C. Toof and Co.***, 833 S.W.2d 896 (Tenn. 1992). *Hodges* stated that in Tennessee, "a court may henceforth award punitive damages if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly." ***Id.*** at 901. Furthermore, the court held that "because punitive damages are to be awarded only in the most egregious of cases, a plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by *clear and convincing evidence*." ***Id.*** (emphasis added) The reasoning provided by the court in establishing this higher standard of proof was to further the underlying purposes of punitive damages, these being punishment and deterrence, and the court stated: "fairness requires that a defendant's wrong be clearly established before punishment, as such, is imposed; awarding punitive damages only in clearly appropriate cases better effects deterrence." ***Id.*** The *Hodges* court went on to explain the trial court's duties in reviewing a punitive award:

> After a jury has made an award of punitive damages, the trial judge shall review the award, giving consideration to all matters on which the jury is required to be instructed. The judge shall clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed.

Id. at 902.

The *Hodges* court defined reckless conduct as taking place when a person "is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." ***Id.*** (citing T.C.A. § 39-11-302(c) (1991) (criminal definition of recklessness)). "It takes something far greater than lack of ordinary care to sustain an award for punitive damages." ***Richardson v. Gibalski***, 625 S.W.2d 715, 717 (Tenn. Ct. App. 1979); *see also* ***Nelms v. Walgreen Co.***, C.A. No. 02A01-9805-CV-00137, 1999 Tenn. App. LEXIS 437, (Tenn. Ct. App. July 7, 1999) (affirming the trial court's ruling that although the evidence "clearly supported a claim of ordinary negligence, the evidence did not support a finding that [defendant pharmacists] engaged in reckless conduct such as to constitute a gross deviation from the required standard of care"); ***Anthony v. Construction Products, Inc.***, 677 S.W.2d 4, 9 (Tenn. Ct. App. 1984) (finding that, although the proof introduced was sufficient to create an issue for the jury as to whether a defendant exercised reasonable and ordinary care, the record did not support an award of punitive damages based on recklessness).

It has been established that, under Tennessee law, "a product liability claimant who presents sufficient evidence to satisfy the Tennessee standard for receiving punitive damages will not be foreclosed from such a recovery simply because his cause of action is founded upon a theory of products liability . . . ." ***Cathey v. Johns-Manville Sales Corp.***, 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *see also* ***First Nat'l. Bank v. Brooks Farms***, 821 S.W.2d 925, 926 (Tenn. 1991).

In explaining our standard of review for issues of fact that require "clear and convincing" proof, this Court has held:

> Our review of a judgment based upon a jury verdict is governed by Rule 13(d), Tennessee Rules of Appellate Procedure. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict. We note, however, that there is a substantial body of case law that, as a matter of law, requires certain facts be established by clear, cogent and convincing evidence . . . *We will, therefore, when we reach issues requiring the evidence to be clear, cogent and convincing, examine the record to determine if there is sufficient proof to constitute clear, cogent and convincing evidence to support the findings of the jury.*

Shell v. Law, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996) (emphasis added). In another decision by this Court, we stated:

> Whether the "clear, cogent and convincing evidence" standard is imposed by statute *or under the common law* and whether the trial is *by jury* or the trial judge sitting without a jury, appellate courts are required to determine from the record whether or not the party bearing the burden of proof has established that his factual contentions are "highly probable." ***Colorado v. New Mexico***, 467 U.S. 310, 315, 104 S. Ct. 2433, 2437-38, 81 L. Ed. 2d 247 (1984); ***Estate of Acuff v. O'Linger***, 56 S.W.3d 527, 533-537 (Tenn. Ct. App. 2001); ***Shell v. Law***, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996).

State v. Layne, No. M2001-00652-COA-R3-JV, 2002 Tenn. App. LEXIS 78, at *17-18 (Tenn. Ct. App. Feb. 1, 2002) (emphasis added); *see also* ***Shahrdar v. Global Hous., Inc.***, 983 S.W.2d 230, 238-39 (Tenn. Ct. App. 1998) (citing ***Shell***, 935 S.W.2d at 405) ("In reviewing a jury verdict where the standard of proof required is clear and convincing evidence, this Court must examine the record to determine if there is clear, cogent and convincing evidence to support the findings of the jury."). "In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is 'highly probable' as opposed to merely 'more probable' than not." ***In re C.W.W.***, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000) (citing ***Lettner v.***

Plummer, 559 S.W.2d 785, 787 (Tenn. 1977); ***Goldsmith v. Roberts***, 622 S.W.2d 438, 441 (Tenn. App. 1981); ***Brandon v. Wright***, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992)). "In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence." ***Id.*** (quoting ***Hodges***, 833 S.W.2d at 901, n. 3).

The verdict form supplied to the jury prior to its Phase One deliberation dealt with the issue of punitive damages by posing the following question: "Do you find, by clear and convincing evidence, that DaimlerChrysler Corporation acted recklessly with regard to the conduct on which you base your finding of liability such that punitive damages shall be awarded against DaimlerChrysler Corporation?" In response to DCC's post trial motions for judgment on the issue of punitive damages, the trial court articulated its findings supporting the award in its June 23, 2005 revised order entitled "Punitive Damages: Findings of Fact and Conclusions of Law."

We believe that the evidence on the record does not support a clear and convincing showing of the requisite recklessness necessary to impose punitive damages under *Hodges*, for several reasons.

First, it appears to be undisputed that DaimlerChrysler's NS minivan seats drastically exceeded the standard set by the federal government and required of manufacturers. Appellees argue that DCC's compliance with FMVSS 207 is not enough to protect it from a finding of recklessness, because it is merely a "minimum" standard, and one which DCC and testifying witnesses knew to be "inadequate" for testing rear-end accidents. However FMVSS 207 set the strength requirement of seats in stationary rear-end accidents at 3,300 inch-pounds of torque, and even according to expert Saczalski's testimony on cross-examination, the NS seats tested at more than twice this standard:

> Q. Sir, is it true or not that DaimlerChrysler on their own set their internal goals well above, almost double the standard?
> A. As far as seat strength, static seat strength –
> Q. Yes.
> A. – yeah, they did that.
> Q. The standard was 3,300 pounds and DaimlerChrysler on their own with no government forcing them to do it, increased it to almost 7,000 pounds or 6,600, somewhere in there?
> A. Correct.
> . . .
> Q. When DaimlerChrysler manufactured the seats, they met and surpassed their own internal goal of 6,500 or so pounds; correct?
> A. Correct.
> Q. And this seat has been tested between 7,000 and 8,200 pounds; correct?
> A. Yes. Inch pounds of torque. Inch pounds of torque.

Dr. Saczalski further agreed that the NS seat nearly doubled every standard for seat back strength in the world.

T.C.A. § 29-28-104 (2006) provides:

> Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

As the issues are not presented on appeal, we are not compelled to review the jury's finding of liability against DCC on Plaintiffs' claims under strict liability and negligence. Assuming that the jury found that the presumption against an unreasonably dangerous product was sufficiently rebutted by Plaintiffs' presentation of evidence of trial, however, we cannot ignore that our legislature has afforded a presumption against an unreasonably dangerous product to manufacturers when the product complies with relevant government regulations through its enactment of T.C.A. § 29-28-104. We believe that DCC's compliance with FMVSS 207 weighs heavily in Appellant's favor against a clear and convincing finding of recklessness that might warrant punitive damages.

Furthermore, while DCC might have had notice of possible hazards to children seated behind the NS seats in rear-end accidents, a strong majority[13] of the 37 "other similar incidents," which the trial court allowed into evidence as relevant to either notice by DCC or to dangerousness or defect, occurred *after* the Sparkmans had purchased their Caravan in May of 1998.[14] The timing of these incidents was a point of contention throughout both the discovery process and the trial itself, but the trial court communicated to the parties that it was allowing the 37 substantially similar "OSI's" into evidence as being probative of notice to DCC, and as proof of a defective or unreasonably dangerous condition. As we discussed in the previous section, Tennessee law allows "other accident" evidence to be admitted for this dual purpose, and these 37 incidents were properly admitted as relevant to dangerousness. However, since this state has not yet adopted a post-sale duty upon manufacturers to warn of defective or unreasonably dangerous products, the jury should not have been permitted to consider the OSI's occurring after May 1998 as establishing notice to DCC of injuries from NS seats.

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[13] Our review of the 37 other similar incidents admitted into evidence by the trial court leads us to conclude that only 12 of these occurred prior to the purchase of the 1998 Caravan by the Sparkmans. These incidents were: Baird, Bajalia, Butler, Corrigan , Dize, Fortney, McCloskey, McNeely, Middleton, Persak, Robinson, and Sauceda.

[14] We are unable to find within the record a specific date on which the Sparkmans purchased the 1998 Caravan. However, the parties appear to have agreed that the purchase occurred in May of 1998.

While DCC requested a Phase I jury instruction stating "You may not award punitive damages based on a finding that [DCC] failed to provide a post-sale warning to Plaintiffs," the trial court did not provide such an instruction. The Phase I instruction regarding a post-sale duty to warn was as follows:

> A reasonable person in the manufacturer's position would provide a warning after the time of sale if, one, the seller knows or reasonably should know the product poses a substantial risk of harm to persons or property; and two, those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and three, a warning can be effectively communicated to and acted upon by those to whom the warning might be provided; and three, [sic] the risk of harm is sufficiently great to justify the burden of proving a warning.

The trial court waited until Phase II, after punitive liability through recklessness had already been found, to provide the jury with the following instruction: "I instruct you that the plaintiffs are not seeking punitive damages based upon and you must not award punitive damages based upon the conduct of DaimlerChrysler underlying plaintiffs' post-sale duty to warn claim."

The trial court subsequently did not provide the jury with an instruction that limited its consideration of the similar incidents, as they related to notice or knowledge of defect, to those incidents occurring prior to the Sparkmans' purchase of the Caravan:

> The law provides evidence of similar incidents involving the product at issue in this case may be admissible and may be considered for the limited purpose of showing, if it does, the product manufacturer's knowledge or notice of the alleged product defects.
>
> You may consider this evidence only if the similar incidents are similar or substantially similar in terms of the allegation of defect or failure to the design defect or product failure alleged in this case.
>
> By this instruction, the Court does not express any opinion as to whether the product manufacturer has had any similar incidents. This is a matter solely for your determination.
>
> If you believe such has been proven, however, you are strictly limited in your consideration of the similar incidents evidence as it relates to the defective product manufacturer's knowledge or notice of the alleged defect.

While we recognize the trial court's patience throughout the trial in dealing with the voluminous evidence of other accidents tendered by Plaintiffs, as well as its thorough efforts to determine which incidents Tennessee law would treat as substantially similar, we find error in the court's failure to

instruct the jury that only those injuries involving NS seats which occurred prior to May 1998 could rationally be considered to have imparted notice to DCC.

In light of these considerations, we cannot say that the 12 admitted OSI's occurring prior to the Sparkmans' purchase of the 1998 Caravan clearly and convincingly placed Appellant on such a high degree of notice as to characterize its failure to replace the seats, warn potential buyers of the danger, or otherwise address the issue, as sufficiently reckless behavior to warrant punitive damages under *Hodges*. While the jury could properly have considered all 37 OSI's as being probative of the dangerousness of the NS seat design, only 12 of the incidents allowed into evidence by the trial court could have been known to DCC prior to the purchase of the Sparkman's Caravan.

Further evidence from the record suggests that the loading strength of the NS seat was comparable to that of the seats of other manufacturers whose minivans were offered for sale in the United States at the time. Under cross-examination at trial, Plaintiffs' expert Saczalski answered questions regarding his deposition responses in the case as follows:

> Q. You might want to go to page 125 line 3.
>
> [reading deposition]Question: At the time of this accident, was [sic] there any other minivans on the market that you believe would have produced a different outcome from Joshua Flax? Answer: Yes. Question: Can you identify those. Answer: The Mercedes-Benz that I showed you earlier, the V class in Europe.
>
> You go on to say that it wasn't available in the United States at the time, and then you talk about the ML 320.
>
> A. Correct.
>
> Q. All right. Now, the ML 320, the minivan that – or the V class that you're talking about, that was that back-to-back minivan that was up very briefly yesterday; correct?
>
> A. Right. Those seats could either be put in back to back or they could be put this [sic] all forward facing.
>
> Q. Not available in the United States at that time? Correct?
>
> A. That was not available at that time, correct.
>
> Q. The ML 320 is actually an SUV; is it not?
>
> A. Yes.
>
> Q. It is not a minivan?
>
> A. Correct.
>
> Q. There were no minivans for sale in the United States in 1998 that had seats that were substantially different than the ones in this particular vehicle, were there, sir?

A. There was, yes. And it was unfortunate that I omitted it, but the Astro van seat carried about 1,800 pounds of load which would be about two and a half times what we have here.
Q. You were asked those same questions under oath and you did not tell us that then, did you, sir?
A. I inadvertently failed to remember that test.
Q. And that was in June of 2004?
A. Correct.
. . .
Q. Isn't it true that in 1998 most vehicles on the road probably had a single-sided recliner – I'm sorry, were probably single-sided recliner seats that were tested in the range of about 700 pounds?
A. Most seats were single-sided recliner at that time, but 700 pounds is about the average, so that's not – there were single-sided recliners that were stronger than that and there were some that were weaker than that. This seat kind of fit in the middle. So most vehicles on the road weren't all 700. That happened to be about the average for the single-sided recliners.
Q. So this vehicle was in the average of the predominant number of vehicles on the road?
A. Yes. What I tested.

From this testimony, it is apparent that Saczalski could identify only one type of minivan offered for sale in the United States in 1998 that had substantially different seats from the NS seat in terms of loading strength. Since Tennessee law allows for a jury to consider industry customs and standards in determining whether a product is defective or unreasonably dangerous,[15] we believe that such

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[15] T.C.A. § 29-28-105(b) (2006) provides, in part:

29-28-105. Determination of defective or dangerous condition.

(a) A manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

(b) In making this determination, the state of scientific and technological knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. *Consideration is given also to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products.*

(emphasis added)

considerations are similarly relevant when determining whether a manufacturer's conduct is reckless.

In ***Jarmakowicz v. Suddarth***, No. M1998-00920-COA-R3-CV, 2001 Tenn. App. LEXIS 125 (Tenn. Ct. App. Feb. 21, 2001), we stated:

> This court has recognized the appropriateness of a directed verdict on punitive damages while allowing the jury to determine liability and award compensatory damages on the basis of the higher burden of proof required to support punitive damages and on the basis of the differing character of conduct necessary to meet the Supreme Court's requirement that only the most egregious conduct warrants punitive damages. See, e.g., ***Nelms v. Walgreen Co.***, 1999 Tenn. App. LEXIS 437, No. 02 A01-9805-CV-00137, 1999 WL 462145 at *2-4 (Tenn. Ct. App. July 7, 1999) (no Tenn. R. App. P. 11 application filed) (plaintiff failed to proved by clear and convincing evidence that defendant acted recklessly although plaintiff established negligence by a preponderance of the evidence, and the trial court properly directed a verdict for the defendant on punitive damages at the close of the proof).
>
> When a court is called upon to determine a motion for directed verdict on punitive damages, the court is "required to determine whether there was material evidence of a clear and convincing nature to support an award of punitive damages," while still taking the strongest legitimate view of plaintiff's evidence. [***Wasielewski v. K Mart Corp.***, 891 S.W.2d 916, 919 (Tenn. Ct. App. 1994)].
>
> When considering a motion for directed verdict on punitive damages, a trial court must limit consideration of the evidence in light of this standard, but it must also find the evidence to be clear and convincing.

Jarmakowicz, 2001 Tenn. App. LEXIS 125, at *41-42 (citing ***Hughes v. Lumbermens Mut. Cas. Co., Inc.***, 2 S.W.3d 218, 227). Given the evidence offered by Plaintiffs at trial, we believe the trial court should have granted DCC's motion for directed verdict on the issue of liability for punitive damages. While there may be material evidence to support a jury finding of negligence, as well as a defective or unreasonably dangerous product, the culpability attributed to DCC in this case does not clearly and convincingly approach the "egregious" standard mandated by *Hodges* for allowing punitive damages. For these reasons, the punitive damage awards under both the wrongful death and NIED theories are reversed.

F. Amount of Damages

Finally, Appellants allege that the compensatory awards and the punitive award, which was significantly remitted by the trial court, were excessive and require a remittitur by this Court. As we have already held that punitive damages should not have been imposed based upon the evidence presented at trial, the issue of an excessive punitive award is pretermitted. Similarly, because we have ruled that plaintiff Sparkman did not offer expert proof of serious or severe emotional distress and therefore did not satisfy the prima facie case for a negligent infliction of emotional distress claim, this portion of the compensatory award against DCC is reversed, and Appellant's challenge to this amount as excessive is also pretermitted. We are, therefore, left to address DCC's challenge to the $5 million wrongful death award to the parents of Joshua as being excessive.

Appellant contends, for the first time on appeal, that the $5 million wrongful death award is excessive. DCC argues that Plaintiffs' expert testified that the present value of Joshua's lost income was $1.3 million, and that the remaining $3.7 million of the compensatory award, representing pain and suffering of Joshua and loss of filial consortium by his parents, "is excessive on its face, and was then duplicated in the punitive award." DCC asks that this Court remit the compensatory damage award for these reasons.

We must recognize that Appellant never challenged the amount of the compensatory award in the trial court, nor did they contest their own liability to Plaintiffs on the negligence or strict liability theories underlying the wrongful death claim. Issues not raised in the trial court cannot be raised for the first time on appeal. ***Barnes v. Barnes***, 193 S.W.3d 495 (Tenn. 2006) (citing ***Simpson v. Frontier Cmty. Credit Union***, 810 S.W.2d 147, 153 (Tenn. 1991)); ***Knoxville's Comty. Dev. Corp. v. Wright***, 600 S.W.2d 745 (Tenn. Ct. App. 1980). Therefore, we affirm the trial court's entry of judgment for $5 million in compensatory damages for the wrongful death of Joshua Flax, the liability for which was apportioned by the jury to be 50% as to each defendant, DCC and Stockell.

IV. CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the judgment of the trial court. We affirm the trial court's denial of DCC's motion for a new trial based upon the *ad damnum* clause issue and the evidentiary issues. As Ms. Sparkman's proof at trial did not satisfy the heightened requirements for a stand-alone negligent infliction of emotional distress claim in Tennessee under *Camper*, the award corresponding with this claim is reversed as to defendant DCC, and affirmed as to defendant Stockell, who did not participate in the trial or this appeal. The remaining judgment entered for $5 million in compensatory damages for wrongful death is affirmed as apportioned by the jury against both DCC and Stockell. The remitted $20 million judgment for punitive damages is reversed. Costs are to be assessed one-half to Appellant, DaimlerChrysler Corporation and its surety, and one-half to Appellees, Jeremy Flax and Rachel Sparkman, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE